

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re:

BKY 04-33703 DDO

*Robert S. Tollefson and
Carole J. Tollefson,*

Chapter 13

Debtors.

NOTICE OF OBJECTION TO
CONFIRMATION OF PLAN

TO: All parties entitled to notice pursuant to LOCAL RULE 9013-3.

1. Jasmine Z. Keller, Standing Chapter 13 Trustee (the "Trustee"), by and through the undersigned counsel, moves the court for the relief requested below and gives notice of hearing herewith.

2. A hearing on this motion will be held before the Honorable Dennis D. O'Brien, Courtroom 228A, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota, at 10:30 a.m. on October 14, 2004, or as soon thereafter as counsel may be heard.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 13, 2004, which is 24 hours before the time set for hearing, or filed and served by mail not later than October 8, 2004 (October 11, 2004 is a federal holiday), which is three business days before the hearing date. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FED. R. BANKR. P. 5005, and LOCAL RULE 1070-1. The proceeding is a core proceeding. The petition commencing this case was filed on June 23, 2004, and the case is now pending in this court.

5. This motion arises under 11 U.S.C. §§ 1322 & 1325 and FED. R. BANKR. P. 3015 and LOCAL RULES 3015-1. Movant requests relief with respect to denial of confirmation of the Plan.

6. The Debtors filed a Chapter 13 Plan dated August 20, 2004 (the "Plan"). The Plan provides for payments of \$865 per month for 40 months for a total contribution of \$34,600. The Plan would allow for distribution on account of estimated nonpriority unsecured claims of approximately \$5,857.97, said amounts estimated at the time of filing. The claims bar date for general unsecured creditors expires on October 26, 2004. As of the date of this objection, the proposed return to unsecured creditors appears to be no more than 29%.

7. To date, the Debtors have paid the Trustee \$2,595 and are current in contributions to the Plan through September 2004.

8. The Debtors' Plan provides for the secured claim of Heartland Credit Union ("Heartland") in the amount of \$13,425 plus interest at 9.2%, for a total payment of \$15,469.

9. The secured creditor has not sought an evidentiary hearing to obtain a determination by the Court that it is entitled to an interest rate greater than the national prime rate plus an additional amount to compensate it for risk. No specific risk factors appear in the record to justify such a demand in this case. Absent a specific determination that a higher interest rate is appropriate, the Trustee would not object to a plan that provided for payment of interest on the allowed secured claim of no more than the national prime rate plus a maximum of 3%, as referenced in *SDS v. Till*, 541 U.S. ___, 124 S. Ct. 1951 (2004).

10. The Debtors appear to have simply acquiesced to the secured creditor's demand for a higher interest rate to avoid a dispute with this creditor. Such acquiescence is made at the expense of their unsecured creditors. It is the Trustee's position that this may constitute a form of bad faith, in that the greater payment to the secured creditor unfairly reduces the amount to be paid to the unsecured creditors. *See, e.g., In re Liles*, 292 B.R. 138 (Bankr. E.D. Texas 2002).

11. If necessary, the Trustee reserves the right to call the Debtors and such other witnesses as may be appropriate and necessary to present an appropriate record to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests entry of an order as follows:

- a. Denying confirmation of the Debtors' Plan; and,
- b. Granting such other and further relief the Court deems equitable and just.

Dated: October 6, 2004

Jasmine Z. Keller, Trustee

/s/ Margaret H. Culp
Thomas E. Johnson, #52000
Margaret H. Culp, #180609
Counsel to the Chapter 13 Trustee
310 Plymouth Building
12 South Sixth Street
Minneapolis, MN 55402
612-338-7591

VERIFICATION

I, Margaret H. Culp, an employee of Jasmine Z. Keller, the Standing Chapter 13 Trustee, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: October 6, 2004

/e/ Margaret H. Culp

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MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the Debtors in their Schedules.

LEGAL DISCUSSION

The Debtors' Modified Plan was not filed in good faith.

The issue of interest rates on cramdown under 11 U.S.C. § 1325(a)(5) have raised numerous issues and disputes since the U.S. Supreme Court's decision on *SDS v. Till*, 541 U.S. ___, 124 S. Ct. 1952 (2004). Creditors argue that the Till decision did not set a specific cap on interest rates at the national prime rate plus a maximum of 3%. Debtors would ordinarily be expected to argue that the maximum rate should not be more than the national prime rate plus the 3% maximum. Absent the presence of additional specific factors that militate in favor of a higher interest rate, it is the Trustee's position that no objection would be filed to a plan that used the national prime rate plus a maximum of 3% as the interest rate for cramdown purposes.

Under 11 U.S.C. § 1325(a)(5), there are three ways in which an allowed secured claim may be appropriately classified and treated under the terms of a Chapter 13 Plan:

- (A) the holder of such claim has accepted the plan;
- (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim, or
- (C) the debtor surrenders the property securing such claim to such holder;....

11 U.S.C. 1325 (a)(5).

As such, it appears that the Plan has properly classified and provided for the claim of Heartland under the specific terms of the Statute.

In reviewing the case law on the issue of fairness wherein a plan favored the interests of a secured creditor at the direct expense of the unsecured creditors, the Trustee did find one case that appears to apply under the circumstances of this case. In that case, the debtors proposed to increase their monthly payments on a long-term secured debt beyond the payments they were contractually obliged to make. *See: In re Liles*, 292 B.R. 138 (Bankr. E.D. Texas 2002). The effect of the debtors' proposal was to pre-pay the secured creditor at the expense of the general unsecured creditors. The Bankruptcy Court found that the plan was not proposed in good faith, as violating the spirit and purpose of the Bankruptcy Code. *Liles*, at 140.

It is the Trustee's position that the situation in this case is analogous to the facts of the *Liles* case. Fundamental fairness and good faith require that debtors not simply acquiesce to demands of secured creditors when the effect of such plan treatment adversely affects the interests of their general unsecured creditors without justification.

For the reasons stated herein, the Trustee respectfully requests that confirmation of the Debtors' proposed Plan be denied, and for such other relief as the Court determines just and equitable.

Respectfully submitted:

Dated: October 6, 2004

Signed: /e/ Margaret H. Culp
Thomas E. Johnson, ID #52000
Margaret H. Culp, ID #180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402-1521
612-338-7591

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UNSWORN DECLARATION
FOR PROOF OF SERVICE

The undersigned, an employee of Jasmine Z. Keller, Standing Chapter 13 Trustee, declares that on October 6, 2004, she served the following:

1. Notice and Objection to Confirmation of Plan and Motion for Reconversion to Chapter 7;
2. Memorandum of Facts and Law;
3. Proposed order; and
4. Unsworn Declaration for Proof of Service

on each of the entities named below as follows:

By electronic means only:

U.S. Trustee
612-664-5516

Robert J. Hoglund, Esq.
651-628-9377

Linda Jeanne Jungers, Esq.
612-870-8758

By United States Mail, postage pre-paid:

Robert S. Tollefson
Carole J. Tollefson
2470 Tower Drive
Woodbury, MN 55125

Robert J. Hoglund, Esq.
P.O. Box 130938
Roseville, MN 55113

Linda Jeanne Jungers, Esq.
Stewart Zlimen & Jungers, Ltd.
430 Oak Grove, Suite 200
Minneapolis, MN 55403
Attorneys for Heartland Credit Union

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 6, 2004

/s/ Margaret H. Culp
Margaret H. Culp

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ORDER

At St. Paul, Minnesota _____.

This matter came before the Court on the Chapter 13 Trustee's Objection to Confirmation of Plan. Appearances were noted on the record. Based on the files, the proceedings, and record herein,

IT IS ORDERED:

Confirmation of the Debtors' Plan is **DENIED**.

Honorable Dennis D. O'Brien
United States Bankruptcy Judge